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In their Petition to Deny, UCC and Rainbow PUSH demonstrated that renewing Fox's licenses disserves the public interest and violates the Communications Act. They demonstrated that Fox had committed serious violations of Commission rules during its license term, including violating the newspaper/broadcast cross-ownership ("NBCO") rule, the obligation of candor, and the *ex parte* rules. Fox had been in violation of the NBCO, without a valid waiver, for almost three years without even attempting to comply. The petitioners also urged the Commission to act on their Petition for Reconsideration of the FCC's 2006 decision granting Fox, in a transfer proceeding, a temporary waiver of the NBCO rule.

Fox's Opposition rests primarily on flawed contentions. First, Fox claims that it did not violate the NBCO rule or candor obligations regarding the NBCO rule because merely filing a request for a waiver, even though the FCC never acts, is the same as complying with the NBCO rule. But merely seeking a waiver does not place one in compliance. Second, Fox claims that it did not commit *ex parte* and other candor violations because, it contends, the 2006 transfer proceeding was never opposed. But whether or not that proceeding was opposed, Fox still committed *ex parte* and candor violations with regard to its 2004 waiver request, which *was* opposed. Beyond these defenses, Fox makes additional arguments, which are misguided and irrelevant.

#### **I. FOX NEEDED TO RECEIVE A WAIVER, NOT MERELY REQUEST ONE, TO COMPLY WITH THE NBCO RULE**

In the Petition to Deny, UCC and Rainbow PUSH argued that Fox was in serious violation of the NBCO from 2003, when its 2001 waiver expired, until three years later, in late 2006, when the FCC granted a new 24-month waiver.<sup>1</sup> They also argued that Fox violated its duty of candor by certifying in its renewal application that it had violated no Commission rules

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<sup>1</sup> See Petition to Deny at 11-12.

or regulations during the preceding license term, even though Fox had violated the NBCO rule.<sup>2</sup>

Fox's defense for both of these violations is that it complied with the NBCO because, though it lacked a valid waiver for almost three years, it had filed a request for a waiver. It claimed:

Commission precedent makes clear that a licensee is "'in full compliance' with the Commission's multiple ownership rules" during the pendency of any waiver extension request.<sup>3</sup>

The entire "Commission precedent" Fox cites consists of one paragraph of one decision, *Counterpoint Communications, Inc.*<sup>4</sup> But *Counterpoint* does not state that any licensee filing "any" waiver extension request is in compliance. Indeed, the Commission never stated that the applicant, even in *that* case, was in full compliance during the pendency of the request.

In that case, Tribune held a temporary waiver of the NBCO for Hartford. When the waiver was expiring, Tribune filed an extension request. For over two and a half years, the Commission did not act on the request. During that time, however, then-Chief of the Media Bureau, W. Kenneth Ferree, sent an unpublished letter to Tribune's counsel, stating: "Based on the original authorization and the terms of the Waiver, the 45-day status reports that have been filed with the Commission, and the pending request for extension" that had been filed one year earlier, "we consider Tribune to be, and to have been, in full compliance."<sup>5</sup>

The Commission never endorsed this letter. In the *Counterpoint* decision, the Commission recounted that Tribune had received such a letter<sup>6</sup> and specifically noted that the letter represented a highly unusual procedure: "We have not identified any other instances in which such a letter was issued."<sup>7</sup> Two concurring Commissioners specifically stated they were

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<sup>2</sup> See Petition to Deny at 14.

<sup>3</sup> See Opposition at 11.

<sup>4</sup> 20 FCC Rcd 8582, ¶21 (2005).

<sup>5</sup> Letter from W. Kenneth Ferree, Chief, Media Bureau, to Tribune Television Co. c/o R. Clark Wadlow, Esq. (Sept. 5, 2003).

<sup>6</sup> 20 FCC Rcd at 8589-90.

<sup>7</sup> 20 FCC Rcd at 8589, n.7.

“troubled by the Bureau’s action in sending a letter to Tribune stating that the company was in full compliance with our rules.”<sup>8</sup>

In addition to the Commission, the Second Circuit noted that the Ferree letter has no precedential effect. After Tribune’s temporary waiver had expired, and after the Ferree letter, but before the Commission finally acted on Tribune’s waiver request, a private plaintiff, Neil Ellis, brought suit in district court to enforce the NBCO. The district court entered judgment for the plaintiff, requiring Tribune to divest “forthwith.”<sup>9</sup> Shortly thereafter, the FCC finally acted, extending Tribune’s waiver. On appeal the Second Circuit ruled that the FCC had primary jurisdiction over the matter.<sup>10</sup> The Court, however, stated that the Ferree letter’s “legal effect is most likely insignificant given that the FCC itself subsequently denounced this practice.”<sup>11</sup>

While “denounc[ing]” the Ferree letter, the Commission also never held that Tribune had been in full compliance while Tribune’s waiver request was pending. The Commission’s decision merely granted another waiver, holding that under the circumstances, and considering Tribune’s efforts as detailed in 45-day reports, a temporary waiver was warranted. Indeed, the district court in the Ellis litigation noted that Tribune had not cited a single decision “supporting its suggestion that the filing of a request for waiver, by itself, tolls the conditions set forth in a final agency order.”<sup>12</sup> So the Commission’s reference to a letter in one opinion does not provide “Commission precedent” for contending that Fox was ever in compliance when it was operating WWOR-TV and the *Post* without a waiver.

Even if the unpublished letter to Tribune had any precedential value, which it does not, its value would not help Fox. The letter pertained only to Tribune’s circumstances; it was based

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<sup>8</sup> 20 FCC Red at 8591 (Comm’rs. Copps & Adelstein concurring).

<sup>9</sup> *Ellis v. Tribune TV Co.*, 363 F.Supp.2d 121, 137 (D. Conn. 2005).

<sup>10</sup> *Ellis v. Tribune Television Co.*, 443 F.3d 71, 73 (2d Cir. 2006).

<sup>11</sup> *Ellis*, 443 F.3d at 88 n.18.

<sup>12</sup> *Ellis*, 363 F.Supp.2d at 129.

on the information in Tribune's 45-day status reports detailing Tribune's attempts to comply with the rules. Some of these efforts, according to the Commission, included "retaining a reputable media broker and station appraisal" and making other "good faith efforts to sell."<sup>13</sup> These circumstances are not present here. Fox has demonstrated no efforts to comply with the NBCO. It did not market an outlet, hire a broker, appraise a station or newspaper, or even consider complying with the rule. Far from standing for the proposition that companies with expired waivers are in "full compliance," the *Counterpoint* decision rather, in the words of two concurring Commissioners, "makes clear that [the Commission] expects to see clear evidence of serious and sustained efforts to come into compliance with our rules before it will consider granting any extension."<sup>14</sup> Indeed, the Second Circuit noted in that case that "[w]ithout an FCC waiver, Tribune is in violation of the FCC's newspaper/broadcast cross-ownership rule."<sup>15</sup>

There is a reason why no Commission precedent suggests that filing for a waiver extension request puts a licensee in compliance. The situation of expiring waivers is not analogous to broadcast renewals, where continuing licenses are authorized by statute and would not undermine FCC rules.<sup>16</sup> By contrast, sanctioning continuing violations merely by filing waiver requests has no statutory authority and would undermine all FCC rules. If the Commission denies a waiver extension request one day, the licensee could file a different waiver extension request the next day and remain in compliance until the Commission acts again. If the

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<sup>13</sup> 20 FCC Rcd at 8586.

<sup>14</sup> 20 FCC Rcd at 8591 (Commissioners Copps & Adelstein concurring).

<sup>15</sup> *Ellis v. Tribune Television Co.*, 443 F.3d 71, 73 (2d Cir. 2006) (determining that the district court should have deferred to the FCC under the doctrine of primary jurisdiction).

<sup>16</sup> Where a broadcaster has filed a license renewal application, by statute, its license continues until the FCC rejects the application. Congress provided for continuance during renewal for broadcast licensees specifically in the Communications Act, 47 U.S.C. §307(c), and for licenses generally in the Administrative Procedure Act, 5 U.S.C. §558(c). The purpose of this provision is to protect complying licensees from problems of administrative delay. *See, e.g., Committee for Open Media v. F.C.C.*, 543 F.2d 861, 867-68 (1976). The situation of a noncomplying licensee seeking waiver of a rule is very different. First, Congress never provided for a continuance in such cases. Second, it would be illogical to permit individuals to violate rules—ranging from antitrust to copyright to fraud—so long as they a request for waiver of the rule, and government has not yet acted on the request.

Commission initially reviews a transaction and grants a waiver shorter than the one requested, the licensee can get the longer waiver merely by waiting until that waiver is about to expire and filing another request. In every service, for every rule, the licensee could ignore any temporary waiver conditions attached to licenses merely by filing repeated requests for extension. The whole time, by Fox's logic, the licensee would be "in full compliance" with a rule it was violating.

## II. FOX'S WAIVER REQUEST WAS OPPOSED

In the Petition to Deny, UCC and Rainbow PUSH demonstrated that Fox had committed *ex parte* violations because Fox's 2004 waiver proceeding was opposed and Fox's representatives met with Commission personnel.<sup>17</sup> It also demonstrated that Fox violated its obligation of candor by making a material omission in its 2005 transfer application by failing to note that the waiver application was opposed.<sup>18</sup>

Fox's defense for both the *ex parte* and candor violations is that the transfer proceeding itself was not opposed. Fox notes that the 2004 waiver proceeding was opposed, but with what Fox calls an "untimely" objection.<sup>19</sup> Because the transfer proceeding was unopposed, in Fox's view, then Fox could engage in *ex parte* contacts and could omit any reference to Free Press's opposition.

But Fox's response is irrelevant. Whether or not the 2005 transfer was opposed, it is sufficient for the *ex parte* and candor violations that the 2004 waiver request was opposed. The 2004 waiver request became opposed when Free Press filed an objection on April 15, 2005 and

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<sup>17</sup> Petition to Deny, at 15-16.

<sup>18</sup> Petition to Deny, at 14.

<sup>19</sup> Opposition, at 11-12.

served it on Fox's counsel. Despite Fox's contention, the objection was timely.<sup>20</sup> The objection explicitly stated: "By filing this letter objecting to Fox's waiver request, Free Press becomes a party as defined in 47 C.F.R. § 1.1202(d) and henceforth, all *ex parte* presentations to or from Commission decision-making personnel are prohibited under 47 C.F.R. § 1.1208. Free Press has served this letter on counsel for Fox as required by 47 C.F.R. 1.1202(b)(1)."<sup>21</sup> As a result, Fox could not have any *ex parte* contacts about the waiver proceeding. Fox's 2004 waiver request was identical to the request made in the 2005 transfer application. It was even attached to the transfer application. If Fox met with FCC personnel *ex parte* and advocated for granting the 2005 transfer, then necessarily it was advocating at the same time for grant of the 2004 waiver request. But Fox has never denied that it met with Commission staff to advocate for granting that 2005 transfer—not in its opposition to petitioners' reconsideration request nor its opposition to their petition to deny.

Fox's formalistic, contorted view seems to be that the 2005 transfer proceeding and 2004 waiver request were entirely unrelated, so *ex partes* could be permitted for one but not the other. But this view would lead to absurd results. It would permit a company to file, for example, a license renewal and attach a waiver request. If the renewal is opposed and the proceeding becomes restricted, the company could merely refile the identical waiver request as a "new" proceeding, and then lobby the Commission *ex parte* to grant the waiver underlying a restricted proceeding.

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<sup>20</sup> Fox suggests that perhaps the 2004 waiver proceeding was also unopposed because Free Press's letter was "untimely." But an opposition is untimely if filed after the date for filing responses as set for in the Commission's public notice. Fox's September 2004 waiver request was never noticed, despite Free Press's request that it be noticed. As a result, it is unclear how an opposition could be "untimely." Even though the request was never put on notice, Free Press filed an objection promptly after learning of the request. Petition to Deny, at 15 n.42; UCC Petition for Recon. 7-8. In response to Free Press's three page letter, Fox filed a 16-page opposition on May 10, 2005. Fox did not once in the 16-page "Opposition" dispute that the waiver was "opposed."

<sup>21</sup> See Petition to Deny at 15 n.42 (quoting Free Press Objection at 4).

In addition to *ex parte* problems, Fox *did* make a material omission. Whether or not the 2005 transfer application was opposed, the 2004 request was opposed. Fox attached its 2004 request as relevant for, and providing clearly relevant information on, the waiver it was requesting in the 2005 transfer. Omitting reference to Free Press's opposition is a material omission because, by omitting the fact, Fox rendered its statements about the 2004 waiver request misleading in the light of the circumstances under which they were made.

### **III. FOX'S OTHER ARGUMENTS ARE MISGUIDED AND IRRELEVANT**

#### **A. The Petitioners Have Standing**

Fox attempts to challenge the sufficiency of the petitioner's standing with two flawed arguments. First, it argues that petitioners suffer no injury from a loss of diversity and competition because the FCC found, and the Third Circuit affirmed, that a blanket ban on newspaper-broadcast cross-ownership is not necessary in the public interest.<sup>22</sup> But the Third Circuit never suggested a blanket approval for *all* cross-ownerships, nor did it ever rule that the specific cross-ownerships—of a daily newspaper and two VHF television stations—at issue here do not harm diversity or competition. The Commission has long held that reduced diversity from cross-ownership is sufficient for standing.<sup>23</sup>

Second, Fox claims that the petitioners lack standing as viewers because of the D.C. Circuit's decision in *Rainbow/PUSH Coalition v. FCC*.<sup>24</sup> In that case, broadcasters had structured an unauthorized transaction of television stations and made financial misstatements to the Commission. The Commission fined the broadcasters for the unauthorized transaction, required certain changes, but took no additional action because the violations were apparently

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<sup>22</sup> Opposition at 14-15.

<sup>23</sup> See, e.g., Applications of Metromedia Radio & Television, 102 F.C.C.2d 1334, n.2 (1985).

<sup>24</sup> 330 F.3d 539, 542 (D.C. Cir. 2003).



mistakes or legal "miscalculations."<sup>25</sup> It permitted the transaction because, while the transaction would have been unauthorized when proposed, the television ownership rule had changed to permit the transaction.<sup>26</sup> Organizations challenged the decision not to take further action, arguing that permitting the transfer would reduce diversity, though it complied with the existing ownership rule. This case is very different from *Rainbow/Push* because Fox is actually in violation of an FCC ownership rule. In fact, in *Rainbow/PUSH*, the court distinguished *Llerandi v. FCC*,<sup>27</sup> a case which involved the violation of another FCC ownership rule, the television duopoly rule. The *Rainbow/Push* court endorsed *Llerandi*'s analysis that being a resident in the relevant viewing area "of its own force established the requisite injury" for standing purposes "because listeners are, by definition, injured when licenses are issued in contravention of the policies undergirding the duopoly rule."<sup>28</sup> Similarly, here, since Fox is in violation of the NBCO, "by definition" viewers are injured by the contravention of that rule. Moreover, in the Second Circuit case involving Tribune's Hartford cross-ownership, that Court held clearly that the viewer had "established Article III standing because he is a Hartford-area resident who suffered an injury-in-fact—a less diverse and less competitive media environment—that was directly traceable to Tribune's common ownership of WTXH and *The Hartford Courant*."<sup>29</sup> Here, petitioners' supporting declarations are more than sufficient to establish standing, as they allege that members who reside in the areas commonly served by WWOR-TV, WNYW, and the *Post* are harmed as viewers and readers by the reduction in diversity caused by the common ownership.<sup>30</sup>

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<sup>25</sup> *Id.* at 541.

<sup>26</sup> *Id.* at 545.

<sup>27</sup> 863 F.2d 79 (D.C. Cir. 1988).

<sup>28</sup> *Rainbow/PUSH*, 330 F.3d at 545 (internal quotations and brackets omitted).

<sup>29</sup> *Ellis v. Tribune Television Co.*, 443 F.3d 71, 80 (2d Cir. 2006). *See also* *Applications of Metromedia Radio & Television*, 102 F.C.C.2d 1334, n.2 (1985).

<sup>30</sup> *See, e.g., Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1000-06 (D.C. Cir. 1966).

## B. Denying Renewals is Not *Ex Post Facto* Law

Finally, Fox's lead argument is a cryptic contention that denying Fox's licenses somehow involves *ex post facto* decision making. Fox claims that:

[T]he Petitioners urge the Commission to rescind Fox's waiver of the NBCO rule; find that Fox violated the rule in view of the rescission of the waiver; and finally, on the basis of the retroactive determination of a violation, deny Fox's renewal applications for WNYW(TV) and WWOR-TV. Quite remarkably, Petitioners advance this request ... without the slightest hint of recognition that denial of a renewal application based upon a retroactive determination of a violation of the NBCO rule would amount to a blatant departure from the rule of law [being] *ex post facto* decision-making.<sup>31</sup>

It is unclear what Fox means by this.

The petitioners are not asking the Commission to "find that Fox violated the rule in view of the rescission of the waiver" granted in the 2006 transfer proceeding. Rather, whether or not the Commission rescinds that waiver, Fox clearly violated the NBCO rule during the three-year period prior to receiving that waiver, during the period after the 2001 waiver had expired.

Other possible interpretations of Fox's arguments are similarly illogical. Fox cannot be asserting that granting the petitioners' petition for reconsideration would be impermissible *ex post facto* decision-making. If it were, the Commission could never reconsider any of its orders.

Nor can Fox assert that the Commission would be changing the law retroactively to find an NBCO violation during the time Fox lacked a valid waiver. But there would be no *ex post facto* change because the law has been the same at all times. Newspaper/broadcast cross-ownerships have been consistently prohibited since 1975. Despite the FCC's decision in the 2002 Biennial Review, the Third Circuit stayed implementation of any new rules during the pendency of judicial review and the agency remand. At no point did the law permit Fox to own WWOR-TV and the *Post* without a valid waiver.

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<sup>31</sup> Opposition at 9-10.

Moreover, neither of the cases Fox cites for its *ex post facto* argument apply here. *Bowen v. Georgetown University Hospital*<sup>32</sup> is inapposite because it involves a rulemaking.

Rulemaking pertains to rules of "future effect," not adjudications.<sup>33</sup> License renewals, by contrast, are adjudications where the Commission must determine, based on the licensee's past activities, if renewal is in the public interest.<sup>34</sup> If determining past violations were *ex post facto* law-making, then all renewal-proceedings would be *ex post facto* law-making.

*RKO General v. FCC*<sup>35</sup> is similarly inapposite. In that case, the Commission denied a license renewal based on anticompetitive conduct that occurred *fifteen* years earlier, not during the preceding license term. Here, Fox's violations occurred during the preceding license term. Moreover, in *RKO General*, the Commission was punishing the licensee for actions that recent Commission precedent deemed unproblematic. As a result, the Commission was changing the law, and then applying that legal change retroactively. Here, the Commission is not changing any rules, but merely enforcing its own long-standing NBCO, as required by its precedent and the Third Circuit stay in *Prometheus Radio Project v. FCC*.<sup>36</sup>

### CONCLUSION

Petitioners have demonstrated that Fox has seriously violated Commission rules. Fox's Opposition does nothing to rebut this showing, as it rests on flawed and irrelevant contentions. Thus the Commission should deny renewal or, at minimum, designate the licenses for hearing.

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<sup>32</sup> 488 U.S. 204 (1988).

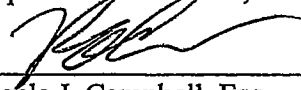
<sup>33</sup> 488 U.S. 204, 216 (1988) (Scalia, J., concurring) (quoting Administrative Procedure Act, 5 U.S.C. § 551(4)).

<sup>34</sup> 47 U.S.C. § 309(k).

<sup>35</sup> 670 F.2d 215 (D.C. Cir. 1981).

<sup>36</sup> 373 F.3d 372 (2004).

Respectfully Submitted,



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Dated: June 19, 2007

### Certificate of Service

I, Marvin Ammori, hereby certify that on this 19<sup>th</sup> day of June 2007, a copy of the foregoing Petition to Deny of Office of Communication of the United Church of Christ, Inc. and Rainbow PUSH Coalition, was served by first-class mail, postage prepaid, upon the following:

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In addition, I have provided courtesy copies via email to all individuals at Federal Communications Commission, 445 12th Street SW, Washington, DC 20554, listed below.

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